Supreme Court, U.S.
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Nos. 92-733 & 92-734

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CHEEVES & THEDORE GIBSON, ET AL.
Petitioners

v.

SOUTHERN CLAYS, INC., ET AL.
Respondents

ON PETITIONS FOR A WRITS OF CERTIORARI,
MANDAMUS AND PROHIBITION
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

REPLY TO BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CURTIS CHEEVES & THEDORE GIBSON, ET AL.
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v.

SOUTHERN CLAYS, INC., ET AL.
Respondents

REPLY TO BRIEF IN OPPOSITION

I. RESPONDENTS' AVOIDANCE OF CONCLUSIVE EVIDENCE

Among the undisputed material facts presented by Petitioners is a "smoking pistol" so hot that Respondents have not dared to address it for fear of conceding Petitioners' entitlement to relief. Pages 4 and 9 of Respondents' Brief in Opposition barely mention the 28 U.S.C. § 372(c) charges filed by Petitioners' counsel. Indeed, Respondents have even deleted § 372(c) references in recasting Petitioners' second question presented. But what the Respondents have **totally avoided** are the following disqualifying admissions made by Judge Owens under oath in testifying on October 10, 1991 before the Special Committee of the Eleventh Circuit Judicial Council. These admissions were made during the pendency of Petitioners' fourth recusal motion filed September 26, 1991, which first asserted Judge Owens' disqualification on the basis of his bias against Petitioners' **counsel**. These admissions remained concealed from Petitioners' and their counsel pursuant to the confidentiality requirements of § 372(c)(14). Not until the judge's testimony was released on June 9, 1992 did Petitioners obtain positive proof of the **falsity** of his claim in his reprisal order of June 5, 1992, that he "harbors no bias or prejudice against Mr. Nix or his clients". (Petition Appendix A-8).

> [JUDGE OWENS]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. I frankly just can only deal with him if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.
>
> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.
>
> JUDGE HOBBS: If it were a litigant other than Mr. Nix, let's say, an attorney other than Mr. Nix, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. I can't answer that hypothetical.
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know.

(Transcript of October 10, 1991 at 342-343, Special Committee Report Appendix F) (emphasis added). These indisputable admissions explain why Respondents' Brief in Opposition con-

tains **no claim** that a fully informed, disinterested lay observer would **not** question the judge's impartiality.

Respondents ask this Court to believe that the Eleventh Circuit was only "presented with the general question of whether the **mere length** of the 28 U.S.C. § 372(c) Judicial Council proceedings involving Judge Owens [and Judge Fitzpatrick and indirectly Judge Elliott] constituted a sufficient appearance of impropriety so as to require recusal of Judge Owens in these cases. The two issues now raised were not addressed below ...". (Brief in Opp. at 9) (emphasis added).

The following Questions Presented to the Eleventh Circuit, as reproduced in Respondents' own appendix, prove that Petitioners argued more than the "mere length" of the § 372(c) proceeding before the Eleventh Circuit.

> 1. Whether a disinterested, objective lay person, fully informed as to the § 372(c) Complaint proceedings concerning the judges "might reasonably question the impartiality" of the judges toward Petitioners and Petitioners' counsel who filed the Complaint?
>
> 2. Whether a disinterested, objective lay person full informed as to the § 372(c) Complaint proceeding concerning the judges might reasonably find it to represent a situation which presents *at least* the "appearance of impropriety?"

(Brief in Opp., Appendix C, p. 21a).

Respondents neglected to inform the Court that the judge's above-quoted Special Committee admissions were in fact quoted in full and argued to the Eleventh Circuit in Petitioners' "Factual Supplement" to their mandamus petition. (Appendix A-13-15 hereto).

Let the Court judge for itself whether the judge's sworn admissions satisfy the district court's own below-quoted "rare circumstances" standard for imputing a court's bias against counsel to counsel's clients.

> Finally, the alleged bias or prejudice must be against the party, not against the attorney or attorney-in-fact for the party. See, e.g., *In re Cooper*, 821 F.2d 833, 838-39 (1st Cir. 1987); *United States v. Burt*, 765 F.2d 1364, 1368 (8th Cir. 1985). **In rare circumstances[1], however, the bias against an attorney is so virulent that the judge's impartiality toward that attorney's client may reasonably be questioned. Id. Such is not the case here. This judge reiterates that he harbors no bias or prejudice against Mr. Nix or his clients.**

(Order of June 5, 1992, Petition Appendix A-8)(emphasis added).

Each of the following admissions prove disqualifying bias against Petitioners' counsel.

> [JUDGE OWENS]: Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever.

Conference and hearing transcripts in Petitioners' cases do not lie. They disclose that in almost seven years of litigation Petitioners' counsel has appeared before Judge Owens only four times. (8/26/88; 6/30/89; 9/27/89; 5/16/90). Transcripts of these conferences and hearings total only 234 pages

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[1] Such "rare circumstances", however, are arguably unnecessary inasmuch as the judge cited and claimed adherence to Canon 3E(1)(a) of the ABA 1990 Model Code of Judicial Conduct requiring disqualification whenever "the judge has a personal bias or prejudice concerning a party or a party's lawyer." (Petition Appendix A-7) (emphasis added).

and evidence only **15 questions** posed by Petitioners' counsel **in seven years**, most of them being procedural. As to whether counsel "talks forever", line-by-line analysis of the transcripts proves that Petitioners' counsel's comments and arguments accounted for only 46% of the transcripts. Judge Owens and other counsel account for the other 54%.

> [JUDGE OWENS]: I frankly just can only deal with [Petitioners' counsel] if I say as little as necessary. And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.

Let Petitioners be equally frank. What the judge has admitted, under a fellow district judge's interrogations, is that he cannot handle or try Petitioners' cases as he normally would so long as Mr. Nix represents Petitioners. Judged in the context of his oath of office (28 U.S.C. § 453) the judge's testimony proves his inability to "administer justice without respect to **persons**" and "impartially discharge" his duties so long as Mr. Nix represents Petitioners.

As to the false inferences intended by comparing Petitioners' counsel to federal habeas petitioners under 28 U.S.C. 2255, the Court should know that the judges of Georgia's Middle District have earned the unique distinction of being the **ONLY** judges whom Petitioners' counsel has **EVER** sought to disqualify or charge with judicial misconduct in nineteen years of extensive state and federal trial practice. Petitioners' counsel has always held Martindale-Hubbell's highest "AV" rating for professional competence and ethical integrity. The Court should also know that the judge's retaliatory "show cause" order of June 5th (Petition Appendix A-6-9) represents the **first** professional misconduct charge **ever** lodged against Petitioners' counsel **by anyone**. These attempts to denigrate his accuser before the Judicial Council are but further proof of the judge's irresistible impulse to retaliate against Petitioners' counsel.

> [JUDGE OWENS]: I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.

What about the judge's admitted attitude toward Petitioners' counsel? He gives no assurance that he is not going to let his **own** attitude toward Mr. Nix affect the cause of Petitioners. As for his insistence that he has to "still preside over these matters", § 455(a) relieves him of any such burden. Can it be that the judge's only concern about relinquishing Petitioners' cases to another judge is the loss of his chance to "even the score" with Petitioners' counsel? Fortunately the objective standard of § 455 spares us the need to divine the true motivation underlying the judge's seeming attempt to retain Petitioners' cases at all costs.

II. RESPONDENTS' MISSTATEMENTS OF FACT

The conclusive effect of the above-quoted disqualifying admissions renders irrelevant most of the misstatements of fact in Respondents' Brief in Opposition. Sadly, it appears that Respondents have shaded or sacrificed the truth to preserve their obvious advantage in retaining Judge Owens in Petitioners' cases. For example, the first three recusal motions filed in Petitioners' cases and all three recusal motions in *U.S. v. Watkins* were all Watkins-based. Only Petitioners' last two recusal motions, both of which were filed and decided **before** Petitioners gained access to Judge Owens' October 10, 1991 Judicial Council testimony, asserted bias and prejudice against Petitioners' **counsel** as a basis for the judges' recusal. (*See e.g.* Petitioners' 9/26/91 Recusal Motion; herein Appendix A-1-11 at 2-3). Respondents' efforts to obscure these distinctions (Brief in Opp. 2), as well as Judge Hodges' failure to distinguish between Watkins-based and counsel-based recusal motions (Brief in Opp. 7) are presently irrelevant. They cannot change the judge's disqualifying admissions of bias against counsel one whit.

Respondents falsely assert that "Mr. Watkins filed judicial misconduct charges against Judge Owens." (Brief in Opp. 4) Mr. Watkins never filed any § 372(c) charges nor was he ever even called as a witness. Such a blatant misstatement, while it should concern the Court, has no effect upon the judge's admitted bias against Petitioners' counsel.

Finally, Respondents' attempt to rehabilitate the judges' impartiality by reliance upon Judge Hodges' own mischaracterization of the record in assessing $500 in Rule 11 sanctions against Petitioners' counsel.[2] (Brief in Opp. 7-8). Respondents failed to advise the Court that Judge Hodges' sanctions order is presently the subject of Petitioners' Rule 59 Motion to Alter or Amend served upon Respondents before they filed their Brief in Opposition.

Thwarting the judge's attempted reprisal against Petitioners' counsel under the guise of Rule 11 sanctions is yet another factor favoring immediate issuance of the summary disposition sought by Petitioners. Given the fact that Judge Owens is a member of the Eleventh Circuit Judicial Council, which includes all active judges of the Eleventh Circuit, Petitioners apprehend that Judge Owens has already lost no time in "poisoning the well" among his Eleventh Circuit brethren. If such has occurred it would perhaps explain why the Eleventh Circuit has turned its back upon the same incontrovertible evidence of disqualification now before this Court.

III. RESPONDENTS' LEGAL ARGUMENTS

All of Respondents' technical legal arguments succumb as well to the conclusive effect of the judge's sworn admissions

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[2] Judge Hodges' attempt to sanction Petitioners' counsel for purported "harassment" of the judge through filing Petitioners' last recusal motion cannot stand in the face of the judge's admissions of bias and prejudice against counsel. Such admissions were not available to Petitioners until June 9th. They prove that Petitioners last recusal motion filed April 9th was well founded and that its denial by the judge on June 5th was clear error. (Petition Appendix A-6-9).

under the disqualification authorities cited in pages 22-30 of Petitioners' Petitions -- authorities strenuously avoided by Respondents.

First, the ultimate issue before this Court of whether the judges' "impartiality might reasonably be questioned" by the man-in-the-street is identical to that presented to the Eleventh Circuit. The fact that Petitioners have cast their Questions Presented in terms of the various factual indicia of disqualification does not alter the question of whether the extraordinary circumstances presented dictate that the judges' "impartiality might reasonably be questioned".[3]

As to Respondents' second argument that the Petitions do not meet the criteria for certiorari, mandamus or prohibition (Brief in Opp. 10) where is Respondents' factual and legal rebuttal to the prima facie elements proven and argued at pages 22-30 of the Petitions? Neither have the Respondents attempted at all to demonstrate, on the basis the undisputed material facts and controlling authorities, why the Court cannot exercise its powers of supervision under Rule 10.1(a), summarily grant Petitioners' Petitions under Rule 16.1, and order permanent reassignment of Petitioners' cases on remand pursuant to 28 U.S.C. § 2106. That all such relief may granted independent of a chief circuit judges's § 292(b) reassignment powers moots Respondents' third argument. (Brief in Opp. 10).

Finally, Respondents' fourth argument (Brief in Opp. 12-13) denying any reprisal by Judge Owens is also adversely controlled by the judge's sworn admissions proving his bias

[3] As emphasized at page 24 of Petitioners' Petitions, the only evidence now before the Court which was not before the Eleventh Circuit was Chief Judge Tjoflat's second reassignment order of July 27, 1992 (Petition Appendix A-4), issued a month after the Eleventh Circuit's June 26th denial of Petitioners' mandamus petition. Once again the Eleventh Circuit's lack of such evidence could not change the conclusive effect of Judge Owens' sworn admissions of bias against counsel -- admissions which were most assuredly argued to and ignored by the Eleventh Circuit. (Appendix 13-15 hereto).

against Petitioners' counsel. Contrary to Respondents' attempt to raise the spectre of abuse, Petitioners do not challenge nor disagree with Respondents' authorities holding that accusations made against judges, whether under § 372(c) or otherwise, do not per se become automatic grounds for disqualification. But none of Respondents' authorities support the proposition that a judge's sworn admissions in a § 372(c) investigation, once publicly disclosed, are somehow "off limits" for purposes of proving that the judge's "impartiality might reasonably be questioned" under 28 U.S.C. § 455.

IV. RELIEF CONSIDERATIONS

It is critical that the Court not forget that Petitioners are seeking **pre-trial** disqualification of Judges Owens, Fitzpatrick and Elliott. Petitioners' situation is therefore distinctly different from those instances in which the Court has qranted plenary review and intervened **post-trial** to protect not the parties bur rather their **counsel** from bias and prejudice in contempt proceedings where the underlying interests of the litigants are no longer in jeopardy or at issue.[4] Neither are Petitioners in the position of needing relief post-judgment on the basis of hitherto unknown disqualifying circumstances as in *Lileberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

These prior instances of intervention by the Court in protecting the integrity and impartiality of the judiciary as well as the due process rights of litigants to trials before impartial tribunals provide strong precedent for granting Petitioners' relief. Are Petitioners' rights to the reassignment of impartial judges in their **trials on the merits** **less** worthy of protection than **counsel's** rights to the reassignment of impartial judges in their post-trial contempt proceedings? Is not a pretrial ounce of prevention for Petitioners to be favored over the post-judgment pound of cure dramatically illustrated in *Liljeberg*?

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[4] *E.g., Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Offutt v. United States*, 348 U.S. 11 (1954); *Cooke v. United States*, 267 U.S. 517 (1925); *Spruell v. Jarvis*, 654 F.2d 1090 (5th Cir. Unit B 1981).

Denying Petitioners at least the reassignment readily available and liberally used under § 2106[5] in exercise of the Court's powers of supervision in the extraordinary circumstances of these cases would most certainly condemn Petitioners to the inadequacy of post-judgment appeals recognized in *Berger v. United States*, 255 U.S. 22, 36 (1921).

> The [disqualification] remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of mind in which there is a personal ingredient.

V. CONCLUSION

Shall the Court stay exercise of its supervisory power in the speculative hope that the Petitioners' pre-trial recusal efforts might at least have the prophylactic effect of assuring that Judge Owens bends over backwards to give Petitioners fair trials on the merits? Petitioners do not ask to be advantaged, as Respondents presently are; they ask only for a level playing field. Absent this Court's remand with directions for reassignment, what relief can this Court entrust to the Eleventh Circuit when it has alredy refused to act even on the basis of a district judges' **sworn admissions of bias against counsel**? Accordingly, upon the undisputed material facts before the Court and the controlling authority of 28 U.S.C. § 455, Petitioners respectfully pray that the Court exercise its powers of supervision, grant the appropriate writ and effect a summary disposition on the merits ordering the permanent reassignment of Petitioners' causes to impartial district judges.

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[5] *E.g., Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992); *United States v. Torkington*, 874 F. 2d 1441 (11th Cir. 1989); *United States v. White*, 846 F.2d 678 (11th Cir. 1988); *Lewis v. Curtis*, 671 F.2d 779 (3d Cir. 1982); *United States v. Robin*, 553 F.2d 8 (2d Cir. 1977) (en banc).

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 8:30 A.M.

SEPT 26, 1991

/s/ Elaine W. Jones
DEPUTY CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

LULA SMITH COURTNEY, as Administratrix of the Estate of Sidney J. Smith, Jr.,	)	
Petitioner,	)	CIVIL ACTION NO. 88-324-3-MAC (WDO)
v.	)	
Defendant.	)	

CURTIS CHEEVES, et al., THEODORE GIBSON, et al.,	)	
Plaintiffs,	)	CONSOLIDATED CIVIL ACTION FILE NO. 86-43-1-MAC (WDO)
v.	)	
SOUTHERN CLAYS, INC. and THE RHODE ISLAND CHARITIES TRUST, by and through its Trustees,	)	
Defendants.	)	

MOTION TO RECUSE AND BRIEF IN SUPPORT

TO: The Honorable Wilbur D. Owens, Jr.
The Honorable Duross Fitzpatrick

COMES NOW the undersigned counsel of record in the above-styled cases, pursuant to 28. U.S.C. §455(a) and Judicial Canon 3C(1), and respectfully moves United States District

Judges Wilbur D. Owens, Jr. and Duross Fitzpatrick to recuse themselves from all further proceedings in the above styled causes upon the grounds that their "impartiality might reasonably be questioned" therein within the meaning of 28 U.S.C. §455(a) and Canon 3C(1) of the Code of Judicial Conduct for United States Judges (69 F.R.D. 273).

This recusal motion is addressed to Judge Fitzpatrick only to the extent that any of the above-styled causes are transferred to Judge Fitzpatrick after any recusal by Judge Owens. Judge Fitzpatrick previously recused himself in the Courtney v. Georgia Kaolin Company case according to correspondence of the Clerk of Court dated September 18, 1989. By correspondence dated July 11, 1989, to the undersigned counsel Judge Fitzpatrick also recused himself from deciding a motion to compel against Anglo-American Clays Corporation in the Cheeves and Gibson cases. The same bases upon which Judge Fitzpatrick previously recused himself in the above-styled cases still apply with equal force to any reassignment of the above-styled cases to Judge Fitzpatrick.

I. INTRODUCTION

This recusal motion is predicated upon entirely different grounds and objective facts completely unrelated to the prior recusal motions in Cheeves and Gibson which Judge Owens previously denied under his Orders of January 17, January 30, and May 23, 1990. This recusal motion has nothing to do with the status of Robert L. Watkins in these cases or the ex parte communications between Judge Owens and Fitzpatrick about Watkins which were the subject of the last Cheeves and Gibson recusal motion. Likewise, the grounds now relied upon are totally different from those previously relied upon in filing the Cheeves and Gibson Mandamus Petition in the United States Court of Appeals for the Eleventh Circuit.

Instead, this recusal motion is predicated exclusively upon the grounds that any objective, disinterested lay observer fully informed about the course of events between the plaintiffs, plaintiffs' counsel, and Judges Owens and Fitzpatrick

since July 20, 1990, might reasonably question the impartiality and the propriety of Judges Owens or Fitzpatrick continuing to preside in these proceedings.

II. OBJECTIVE MATERIAL FACTS

1. On July 20, 1990, plaintiffs' counsel filed Judicial Misconduct Complaint No. 90-2132 ("the Complaint") pursuant to 28 U.S.C. §372(c) against Judges Owens and Fitzpatrick with the Judicial Council of the United States Court of Appeals for the Eleventh Judicial Circuit, charging such judges, inter alia, with concerted and wilful violations of the disqualification and recusal mandates of 28 U.S.C. §§ 144 and 455, and Canons 3A(4) and 3C(1) of the Code of Judicial Conduct for United States Judges. The contents of the Complaint are well known to both judges.

2. Eleventh Circuit Chief Judge Tjoflat, after finding probable cause pursuant to 28 U.S.C. § 372(c)(4) and Judicial Council Rule 4, caused the Complaint to be formally docketed on August 17, 1990 and subsequently issued his notice dated September 14, 1990.

3. On January 21 and 22, 1991, plaintiffs' counsel met with private investigative counsel, explained in great detail the judicial misconduct committed by Judges Owens and Fitzpatrick, identified numerous witnesses who could give testimony in support of the Complaint, and answered all questions asked by investigative counsel.

4. By correspondence dated January 24, 1991, plaintiffs' counsel reported all of the misconduct of Judges Owens and Fitzpatrick to the Public Integrity Section of the Criminal Division of the United States Department of Justice. Plaintiffs' counsel charged Judge Fitzpatrick with violation of 18 U.S.C. § 201 (bribery) and Judge Owens and Judge Fitzpatrick, acting individually, and in concert, with obstruction of justice under the omnibus clause of 18 U.S.C. § 1503. Since January 24, 1991, plaintiffs' counsel has cooperated with the Public Integrity Section and the Federal Bureau of Investigation in providing

additional information and documents relevant to the subject criminal investigation.

5. Since first meeting with private investigative counsel plaintiffs' counsel has continued to provide such counsel with supplemental information and documents in support of the Complaint.

6. Only July 3, 1991, plaintiffs' counsel reported certain aspects of the misconduct of Judges Owens and Fitzpatrick to the Supreme Court of the United States by way of posing, inter alia, the following "question presented" in the Certiorari Petition filed July 3, 1991, in Watkins v. United States, No. 91-184:

> Can two federal district judges, one acting as accuser and the other acting as the accuser's advisor and Petitioner's trial judge, engage in the following concerted conduct -- i.e., (a) engage in secret, ex parte "in-chambers conferences" and "oral communications", with the object of procuring Petitioner's investigation, indictment, prosecution and conviction; (b) thereafter conceal such communication in denying Petitioner's pretrial recusal motion under Section 455(a) based on other evidence; (c) subsequently misrepresent and lie to defense counsel in claiming no ex parte acquired knowledge about Petitioner; (d) subsequently deny Petitioners' post-trial recusal motion under 28 U.S.C. §§ 455(a) and 144, while admitting for the first time the judges' ex parte communications about Petitioner but excusing such contacts as "not extrajudicial" and (e) thereafter absolutely refuse to disclose voluntarily all material facts and thwart all efforts of defense counsel to discover the full extent and subject matter of all information exchanged between the judges -- without having violated the Fifth Amendment to the Constitution of the United States, 28 U.S.C. §§ 144 and 455, Judicial Canons

1,2,3A(4) and 3C(1), the omnibus clause of 18 U.S.C. § 1503 (obstruction of justice) and, at a minimum, committed acts prejudicial to "the effective and expeditious administration of justice" within the meaning of 28 U.S.C. § 372(c) (1)?

7. On September 16, 1991, plaintiffs' counsel was served with a subpoena to appear at hearings scheduled upon the Judicial Misconduct Complaint. Plaintiffs' counsel has since been invited to submit the names of witnesses who can be called to testify in support of the Complaint's allegations.

8. Plaintiffs' counsel not only intends to appear to testify against Judges Owens and Fitzpatrick at the scheduled hearings but also intends to identify other witnesses to the judges' misconduct and otherwise exercise all of plaintiffs' counsel's rights as a complainant under Judicial Council Rule 13. Plaintiffs' counsel further intends to present additional written information and argument to the Special Committee respecting the judges' judicial misconduct and after issuance of the Eleventh Circuit Judicial Council's decision, to exercise fully complainant's right of appeal to the Judicial Conference of the United States, if necessary.

III. ARGUMENTS AND AUTHORITIES

A. GOVERNING AUTHORITIES.

This recusal motion is controlled by the mandates of 28 U.S.C. § 455(a) and Judicial Canon 3C(1) of the Code of Judicial Conduct for the United States Judges.

§ 455. Disqualification of Justice, Judge or Magistrate

(a) Any justice, judge or magistrate, of the United States **shall** disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (emphasis added).

Canon 3C(1)

C. Disqualification

(1) A judge **shall** disqualify himself in a proceeding in which his impartiality might reasonably be questioned ..." (emphasis added)

B. ISSUES NOT PRESENTED

Plaintiffs' reliance upon the above-quoted recusal standards requires no proof of any personal bias or prejudice by the subject judges nor is it based upon a recusal mandate which is peculiar to the plaintiffs alone. The issue therefore is not whether the judges hold any personal bias or prejudice against the plaintiffs or against plaintiffs' counsel as a result of the course of events initiated by plaintiffs' counsel against both judges. Instead the only issue presented is whether a disinterested, objective, lay observer, fully advised of all the above-stated indisputable actions of plaintiffs and plaintiffs' counsel, "might" entertain a reasonable doubt about the judges' ability to conduct the above-style proceedings with impartiality.

In denying prior recusal motions based upon entirely different grounds, Judge Owens has consistently avoided the above-quoted standards with irrelevant subjective disclaimers of any personal bias or prejudice toward the Cheeves and Gibson parties and their personal representative. Such disclaimers are relevant only to recusal motions predicated upon 28 U.S.C. § 455(b) and Canon 3(c) (1) (a), neither of which are the basis of this recusal motion.

C. PROCEDURAL ISSUES

Neither does there exist any procedural basis for Judge Owens' avoidance of this recusal motion. Contrary to prior holdings by Judge Owens in the Cheeves and Gibson cases, no affidavit is required for recusal motions brought exclusively under 28 U.S.C. § 455(a) and Canon 3C(1). Neither is a certifi-

cate of good faith by counsel, as required under 28 U.S.C. § 144, required to accompany this recusal motion. Unlike the one-motion limit imposed by 28 U.S.C. § 144 there is no limit to the number of recusal motions which may be filed under 28 U.S.C. § 455(a) and Canon 3C(1).

Judge Owens also cannot claim that he has already resolved or decided this recusal motion in prior decisions or orders of the Court inasmuch as the objective facts upon which it is based constitute entirely new grounds which have arisen since the Court's denial of the last recusal motion in Cheeves and Gibson with its Order of May 23, 1990. Indeed, these new grounds are continuing to develop and arise as the proceedings which plaintiffs and plaintiffs' counsel have initiated against both judges continue to evolve.

D. ISSUE PRESENTED

The one issue -- i.e., whether both judges' "impartiality might reasonably be questioned" -- under the above-quoted recusal standards and the standard under which the issue is to be answered have been clearly explained by the United States Court of Appeals for the Eleventh Judicial Circuit in United States v. Kelly, 888 F.2d 732 (11th Cir. 1989).

> Congress rewrote Section 455 in 1974 for the specific purpose of "broaden[ing] and clarify[ing] the grounds for judicial disqualification." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 2197, 100 L.Ed.2d 855 (1988). Under the new version of Section 455, a judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist. Section 455 does away with the old 'duty to sit' doctrine and requires judges to resolve any doubts they may have in favor of disqualification.

> "The very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." Liljeberg, 108 S.Ct. at 2205. Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the judge during the affected proceeding, are prerequisites to disqualification under this section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the judge. The standard for recusal under Section 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."

Id. at 744 (emphasis added).

The "objective" test of Section 455(a) and Canon 3C(1) was specifically instituted to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S. Rep. No. 93-419, at 5; H.R. Rep. No. 93-1453, at 5.

Liljeberg v. Health Services Acquisition, Corp., 486 U.S. 847, 864-65, 108 S. Ct. 2194, 2205 (1988) (footnote omitted). Thus, it is beyond cavil that it is the opinion of the lay observer respecting the objective facts stated above and not the Court's own

subjective opinions of its impartiality that govern whether disqualification of both judges is mandated by Section 455(a) and Canon 3C(1).

E. RESOLUTION OF DOUBTS

Finally, it is clear that any suspicions or doubts which a lay observer might readily derive from the material, undisputed facts stated above respecting the actions of plaintiffs and plaintiffs' counsel towards both judges must be resolved in favor of finding a potential impropriety or appearance of impropriety. In the words of the Eleventh Circuit, the question which Judge Owens must face and answer is whether the above-stated objective material facts "'present a potential for actual impropriety if the worst implications are realized.'" Parker v. Connors Steel Co., 855 F.2d 1510, 1524, n.12 (11th Cir. 1988) (emphasis added) (citation omitted), cert. denied. 109 S.Ct. 2066 (1989). After drawing the worst implications from the above-stated objective facts in terms of the likelihood that "the judges impartiality might reasonably be questioned", the Eleventh Circuit has further directed this Court to "resolve any doubts ... in favor of disqualification." Kelly, supra, 888 F.2d at 744 (emphasis added).

F. STATUTORY ANALYSIS

Reviewing the statutory analysis utilized by the Supreme Court in Liljeberg, as well as the express language of Section 455(a) and Canon 3C(1) underscores the necessity of recusal by both judges in the above-styled causes. Paraphrasing the Supreme Court's inquiry in Liljeberg, "might" Judge Owens' continued presiding over the above-style causes present a sufficient "appearance of impropriety" so as to require both judges to recuse themselves in order to avoid the "suspicions and doubts" which a disinterested lay observer would undoubtedly entertain? Or, in the words of the statute, "might" any reasonable layman question both judges' impartiality, in which event both judges "shall" disqualify themselves?

The statutory language of Section 455(a) and Canon 3C(1) asks not whether a reasonable "would" question the

judges' impartiality toward the plaintiffs' or their counsel. To the contrary, the much broader question presented is whether their exists the mere possibility under the objective facts that judges' impartiality "might" reasonably be questioned. Unless it can be said beyond "any doubt" that no reasonable person might question the judges' impartiality, recusal is mandatory not only under Liljeberg but also under the "any doubts" mandate of Kelly.

IV. CONCLUSION

Any continued insistence by Judge Owens to preside over the above-style cases in spite of the above-stated objective facts and applicable law would be extraordinary indeed. Liljeberg makes clear that Section 455(a) eliminated any vestiges whatsoever of the old "duty to sit" doctrine. Moreover, neither of the judges have any propriety interest in presiding over the above-styled cases. As the Supreme Court of the United States observed long ago, a judge's disqualification "presents no serious detriment to the administration of justice nor inconvenience worthy of mention for of what concern is it to a judge to preside on a particular case; or what concern to other parties to have him so preside?" Berger v. United States, 255 U.S. 22, 35 (1921).

Plaintiff's counsel was compelled by Directory Rule 1-103(B) of the Code of Professional Responsibility to file the Complaint now pending against both judges. Counsel has the further professional responsibility to his clients in the above-styled causes to insure, through the enforcement of Section 455(a) and Canon 3C(1), that the plaintiffs' Fifth Amendment right to trial of their cases before a fair and impartial tribunal is preserved. In so doing, plaintiffs' counsel has absolutely no control over choice of judge before whom the plaintiffs' cases may ultimately be heard. Of all of the risks normally attendant to litigation, no party should have to be subjected to the risk that his cause may suffer through the conscious or unconscious reprisal of the Court against actions taken by plaintiffs' counsel in discharge of his professional responsibilities and protection of his clients' rights.

Judge Owens may genuinely and sincerely believe that despite the actions of plaintiffs' counsel he can put aside any resentment or ill feelings engendered by counsel's actions and preside over the above-styled suits justly. But that is not the test imposed by Section 455(a) and Canon 3C(1). The test is whether an objective disinterested layman "might" doubt or suspect that Judge Owens, being human could not lay aside any such resentment or ill feelings. Moreover, apart from Judge Owens' conscious feelings, impartiality is more likely to be affected by unconscious thought processes with the result that Judge Owens may have little or no conscious knowledge of being swayed by such improper influences as antipathy towards plaintiffs' counsel. Even if Judge Owens were theoretically able to put aside both his conscious and unconscious feelings and reactions to the actions of plaintiffs' counsel, the taint of impropriety would continue to surround any ultimate result in these cases, and in turn, cast disrepute upon the judiciary. In the final analysis, therefore, recusal in any case involves not only adherence to Section 455(a) and Canon 3C(1) but also upholding the judge's obligation under Canon 1 to "uphold the integrity and independence of the judiciary" and under Canon 2 to avoid impropriety and the appearance of impropriety in a "manner that promotes public confidence in the integrity and impartiality of the judiciary."

This 25th day of September, 1991.

/s/ Franklin R. Nix
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
RECEIVED
JUN 17 1992
ATLANTA, GA.

No. 92-8554

IN RE: ROBERT WATKINS,
THEODORE GIBSON,
CURTIS CHEEVES, ET AL.,

Petitioners.

Petition from the United States District Court
for the Middle District of Georgia
Macon Division

PETITIONERS' FACTUAL SUPPLEMENT TO
JOINT PETITION FOR WRITS OF MANDAMUS
AND PROHIBITION DISQUALIFYING
THE HONORABLE WILBUR D. OWENS, JR.
THE HONORABLE DUROSS FITZPATRICK
THE HONORABLE ROBERT ELLIOTT

I. ISSUES PRESENTED

Presently pending before the Court are the following three issues presented at page 6 of the above-styled Joint Petition filed June 12, 1992.

1. Whether a disinterested, objective lay person, fully informed as to the § 372 (c) Complaint proceedings concerning the judges "might reasonably question the impartiality" of the judges toward Petitioners and Petitioners' counsel who filed the Complaint?

2. Whether a disinterested, objective lay person fully informed as to the § 372(c) Complaint proceeding concerning the judges might reasonably find it to represent a situation which presents **at least** the "**appearance** of impropriety?"

3. Whether any doubts about the propriety of the judges presiding over Petitioners' proceedings must be resolved in favor of disqualification through issuance of the writs sought by Petitioners?

II. ADDITIONAL MATERIAL FACTS

In light of the above-stated issues, the purpose of this factual supplement is to provide the Court with additional material facts consisting of Judge Owens' testimony before the Special Committee, which testimony was not made available to Petitioners' counsel until June 9, 1992, and to acquaint the Court as well with the substance and pendency of the criminal charges lodged by Petitioners' counsel with the Public Integrity Section of the Criminal Division and the Criminal Section of the Civil Rights Division of the United States Department of Justice.

A. Judge Owens' Attitude Toward Petitioners' Counsel.

Notwithstanding Judge Owens' assertion in his order of June 5, 1992 that he "harbors no bias or prejudice against Mr. Nix or his clients" (Petition Exhibit C at 3), Judge Owens' sworn testimony at page 342 of his 25 pages of testimony before the Special Committee suggests otherwise.

> [JUDGE OWENS]: **Well, Mr. Nix as you may have observed, is a person who when given one answer then asks you ten more questions. He talks forever. I frankly just can only deal with him if I say as little as necessary.** And that's the posture I have. He reminds me a lot of some of the prisoners we have to deal repeatedly on 2255.

> I have to still preside over these matters, you know, in spite of his attitude towards me. And I'm not going to let his attitude toward me affect the cause of his clients. But he's still going to give his clients their day in courts.
>
> JUDGE HOBBS: If it were a litigant **other than Mr. Nix**, let's say, an attorney **other than Mr. Nix**, and he said, Judge, I understand you had a communication with Judge Fitzpatrick about this, and I know how strongly Judge Fitzpatrick feels about Mr. Watkins, I want to know could that conversation have affected you in any way in terms of your presiding over this thing, and would you tell me what that conversation was?
>
> [JUDGE OWENS]: Well, Judge, to be honest with you, I guess I would have to wait until that happened. I can't answer that hypothetical.
>
> JUDGE HOBBS: I just wondered if maybe we wouldn't all of us be somewhere else today. I don't know.

(Transcript of October 10, 1991 at 342-343, Special Committee Report Appendix F) (Exhibit A hereto) (emphasis added).

Although Judge Owens' response to Judge Hobbs' above-quoted question was admittedly "hypothetical" via-a-vis counsel other than Mr. Nix, Judge Owens' actual response to Mr. Nix's prior non-hypothetical inquiries comparable to that posed by Judge Hobbs -- such inquiries being in the form of interrogatories and a presently pending deposition and duces tecum subpoena now the subject of the Government's motion to quash, was an unqualified refusal to provide any information whatsoever. The above-emphasized testimony of

Judge Owens respecting Mr. Nix raises squarely the issue of whether a disinterested, objective lay person fully informed of Judge Owens' stated attitude toward Mr. Nix "might reasonably question Judge Owens' impartiality."

B. Criminal Charges Lodged January 24, 1991.

Attached hereto as Exhibit B is a true copy of Mr. Nix's correspondence of January 24, 1991 formally lodging charges with the Public Integrity Section of the Criminal Division of United States Department of Justice. The correspondence charged Judge Fitzpatrick with possible violations of 18 U.S.C. § 201 (bribery) and Judges Owens and Fitzpatrick acting in concert with conduct obstructing justice in violation of 18 U.S.C. § 1503. After having investigated only the bribery charge against Judge Fitzpatrick, the F.B.I. closed its investigation pursuant to a memo dated November 25, 1991 incorporated at pages 52-54 of the Special Committee's Report.

C. Criminal Charges Lodged May 29, 1992.

Pursuant to correspondence dated May 29, 1992 addressed to the Public Integrity Section of the Criminal Division and the Criminal Section of the Civil Rights Division of the United States Department of Justice (Exhibit C), Mr. Nix charged Judges Owens and Fitzpatrick with criminal obstruction of justice, a charge which had not been previously investigated, and with criminal violations of the Petitioners' civil rights under 18 U.S.C. §§ 241 and 242. The present status of these charges before the Department of Justice is unknown except for correspondence of Linda K. Davis, Chief of the Criminal Section of Civil Rights Division dated June 9, 1992 (Exhibit D) advising that the investigation of all charges would be conducted by the Public Integrity Section and the Office of Professional Responsibility. Upon receiving Ms. Davis' letter on June 11, 1992, Petitioners' counsel advised Thomas Burrows, Esq. of the Public Integrity Section by facsimile dated June 11, 1992 of the issuance and public availability of the Special Committee's Report. What effect the Special Committee's

Report and Judicial Council action thereon may have upon the pending charges and the Justice Department's investigation thereof is unknown.

III. ARGUMENT

Petitioners' counsel do not doubt that Judge Owens subjectively and sincerely believes, despite the actions of Petitioners' counsel and Judge Owens' above-quoted attitude toward Mr. Nix, that he can put aside any resentment or ill feelings engendered by counsel's actions and justly preside over Petitioners' proceedings. But that is not the test imposed by Section 455(a) and Canon 3C(1). The test is whether an objective, disinterested layman "might" doubt or suspect that Judge Owens, being human, could not lay aside any such resentment or ill feelings.

Apart from Judge Owens' conscious feelings, impartiality is more likely to be affected by unconscious thought processes with the result that Judge Owens may have little or no conscious knowledge of being swayed by such improper influences as antipathy towards Petitioners' counsel. Even if Judge Owens were theoretically able to put aside both his conscious and unconscious feelings and reactions to the actions of Petitioner's counsel, the taint of impropriety would continued to surround any ultimate result in these cases, and in turn, cast disrepute upon the judiciary.

And what purpose is served by deferring the resolution of the recusal issues presented herein until after trials or hearings on the merits of Petitioners' causes rather than eliminating by writs of mandamus any disqualification and new trial grounds and later appeals. If the writ sought herein were denied and Petitioners lost their proceedings before Judge Owens, the very same facts already amassed before the Court would dictate on direct appeal a new trial for Petitioners before a different judge as in Liljeberg. Petitioners, however, have no interest in retaining and preserving for later appeal disqualification and new trial grounds already proven by the objective facts before the Court. To the contrary, Petitioners ask only for

a "level playing field"; for but one trial before a judge whose impartiality is beyond question or reproach.

IV. CONCLUSION

In the final analysis recusal in any case involves not only adhering to Section 455(a) and Canon 3C(1) but also upholding the judges' obligations under Canon 1 to "uphold the integrity and independence of the judiciary" and under Canon 2 to avoid "impropriety and the appearance of impropriety" (Canon 2 Commentary) in a "manner that promotes public confidence in the integrity and impartiality of the judiciary." For these reasons and those set forth in Petitioners' original petition, counsel respectfully request issuance of the writs sought hereby.

Respectfully submitted,

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